(25,951)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 1121.

ADELBERT HARRIS, BY HIS NEXT FRIEND, ALBERT HARRIS,

vs.

THE DISTRICT OF COLUMBIA.

ON A CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 18, 1917.

1 In the Court of Appeals of the District of Columbia.

No. 2817.

ADELBERT HARRIS, by His Next Friend, ALBERT HARRIS, Appellant,

vs.

THE DISTRICT OF COLUMBIA.

The Court of Appeals of the District of Columbia certifies that the record in the above-entitled case discloses the following:

Adelbert Harris, a minor seven years of age, by his next friend, filed a declaration in the Supreme Court of the District of Columbia, August 20, 1913, against the District of Columbia, to recover damages for the loss of a part of a finger through the alleged negligence of an employee of the District of Columbia.

The declaration alleged that the defendant is a body corporate for municipal purposes, and was on May 13, 1913, engaged in the business of watering certain streets and avenues of the City of Washington.

Plaintiff's testimony tended to show that on or about May 13, 1913, at 10:30 A. M., he was standing near a water plug at 19th Street and Pennsylvania Avenue, Northwest, which plug was being used by a colored man, an employee of the defendant, whose name is unknown; that the top or cap of said plug had been removed and rested upon the ground, being connected to said plug by a hinge; that the man was drawing water from the plug which was being conveyed by a hose into a sprinkling cart for the purpose of refilling the same; that there were a number of such carts operating on the streets at that point; that when the said employee had drawn off as much water as desired, he shut off the flow of water by means of a stop cock operated by a wheel, after which he removed the hose from the nozzle

2 and raised the top or cover for the purpose of closing the plug.

A small stream of water continued to flow from the nozzle, and while the man was in the act of replacing the cap and had it raised about half way from the ground, he told the plaintiff to shut off the water which was still flowing in a small stream. Thereupon the plaintiff placed his finger upon the small handle or lever attached to the nozzle, and while he had his finger within the line of the outer and lower casement of the plug, the man dropped the said cap or cover and in doing so caught the end of plaintiff's index finger of the right hand between the edge of the cap or cover and the lower edge of the plug and severed a portion of the finger from plaintiff's hand at or near the first joint.

The plaintiff's testimony further tended to show that the sprinkling tanks of which the one which was being refilled with water was

one, were then and there engaged in sprinkling the adjacent streets, to wit, Pennsylvania Avenue and 19th Street, preparatory to sweeping them.

The defendant did not contradict the facts aforesaid but based its defense upon matter of law, namely, that the sprinkling cart was being used for the purpose of protecting the public health of the community at large and was thus engaged in a public governmental function for the protection of the public health, for which the District of Columbia is not liable for an injury by one of its employees so engaged.

Upon the conclusion of the testimony of the plaintiff, the defendant moved the Court to direct a verdict for the defendant because the evidence showed that the defendant, through its agent, was engaged in a governmental function and could not be required to respond in damages for the injury. The Court granted this motion, which was excepted to by the plaintiff, and the jury returned a verdict for the defendant, on which this judgment was rendered.

3 The Court of Appeals certifies that the following question of law arises upon the record, the decision of which is necessary for the proper disposition of the cause, and to the end that a correct result may be reached, desires the instruction of the Supreme Court of the United States upon the said question, to wit:

Is the sprinkling of the streets to keep down dust for the purpose of the comfort and health of the general public, a public or governmental act as contradistinguished from a private or municipal act, which exempts the District of Columbia from liability for the injuries caused by one of its employees engaged therein?

SETH SHEPARD,
Chief Justice.
CHAS. H. ROBB,
JOSIAH A. VAN ORSDEL,
Associate Justices.

(Endorsed:) No. 2817. Adelbert Harris, by His Next Friend, Albert Harris, Appellant, vs. The District of Columbia. Certificate. Court of Appeals, District of Columbia. Filed Apr. 27, 1917. Henry W. Hodges, Clerk.

4 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing typewritten pages numbered from 1 to 3, inclusive, contain a true copy of the certification from this Court to the Supreme Court of the United States of the question stated therein in the case of Adelbert Harris, by His Next Friend, Albert Harris, Appellant, vs. The District of Columbia, No. 2817, April Term, 1917, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the

seal of said Court of Appeals, at the City of Washington, this 27th day of April A. D. 1917.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 25,951. District of Columbia Court of Appeals. Term No. 1121. Adelbert Harris, by his next friend, Albert Harris, vs. The District of Columbia. (Certificate.) Filed May 9th, 1917. File No. 25,951.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

No. [redacted]16

ADELBERT HARRIS, BY HIS NEXT FRIEND, ALBERT HARRIS, APPELLANT,

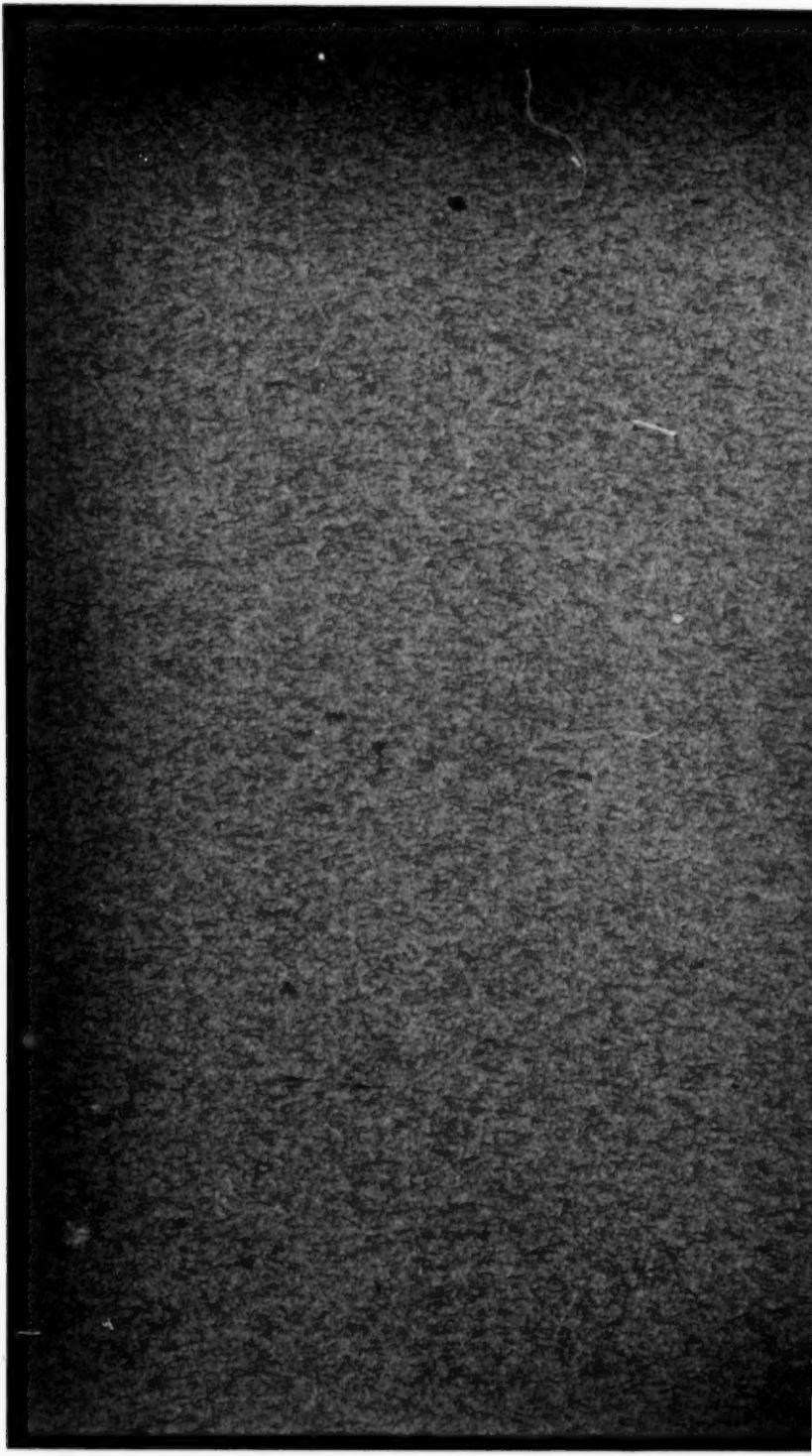
vs.

DISTRICT OF COLUMBIA, APPELLEE.

ON A CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF APPELLANT.

ROSSA F. DOWNING,
Attorney for Appellant.



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IN THE

Supreme Court of the United States.

No. 1121.

ADELBERT HARRIS, BY HIS NEXT FRIEND, ALBERT HARRIS, APPELLANT,

vs.

DISTRICT OF COLUMBIA, APPELLEE.

Statement of Facts.

The plaintiff, Adelbert Harris, was, on the thirteenth day of May, 1913, 6 years, 10 months and 14 days old, and on said day at or about the hour of 10.30 a. m., he was standing upon the northeast corner of Nineteenth Street and Pennsylvania Avenue Northwest, a few feet north of a water plug owned, operated, managed, and controlled by the defendant. At the time that plaintiff came near to the plug it was open, and a colored man, an employe of the defendant, was drawing water from it, which was being conveyed by means of a hose attached to a nozzle in the plug, into a sprinkling cart for the purpose of filling the same with water, and there were a number of such carts operating on the streets at that point. When the said employe had drawn off as much water into the cart as he desired he shut off the flow by means of a stop-cock operated by a wheel. He then removed the hose from the nozzle and raised the cap or cover from the ground for the purpose of closing it up. A small stream of water still continued to flow from the nozzle, and while said employe was in the act of replacing the cap or cover of said plug, and when he had

raised it about half way from the ground, he told the plaintiff to shut off the water which was still flowing, as stated, in a small stream from the nozzle. Thereupon the plaintiff placed his finger upon the small lever or handle annexed to the nozzle, and while he was in the act of shutting off the water the said employe of the District dropped the cap or cover, and in so doing caught the end of plaintiff's index finger of the right hand between the edge of said cap or cover and the lower rim or edge of the plug casement and severed a portion of it from his hand at or near the first joint. Plaintiff at once called the attention of said employe of the defendant to the injury which he had sustained, saying to him "now look what you have done." Said employe of the defendant made no reply, but mounting the sprinkling cart he had just filled drove off. Plaintiff then started towards his home, which was nearby, binding his finger up in his jacket, or coat, and upon meeting his mother went back with her to the plug. She opened the plug again, and found within resting upon the bottom, directly under the lever or handle above referred to the severed portion of plaintiff's finger, and brought it home, where she had preserved it in alcohol to the day of the trial. It appears from the testimony that the sprinkling tanks, of which the one which was being refilled with water was one, were then and there engaged in sprinkling the adjacent streets, to wit, Pennsylvania Avenue and Nineteenth Street, preparatory to sweeping them. The plaintiff was taken to the Emergency Hospital, where his finger was treated. It is further conceded that there were at the time of the accident a number of sprinkling tanks or carts around the streets in the neighborhood of said plug which were labeled "District of Columbia Street Cleaning Department," and it was further admitted that these carts were engaged in sprinkling the streets at that point and were engaged and employed by the District of Columbia.

Assignment of Error.

The court erred in directing a verdict for defendant.

ARGUMENT.

At the conclusion of plaintiff's testimony, on motion of defendant, the court directed a verdict for defendant on the ground that the defendant was, on the occasion of the accident narrated in the evidence, engaged in a public or governmental function and therefore could not be held to respond in damages for the negligence of its agent while so employed. This was the only point before the court below, and as plaintiff's counsel understands, the only point before this court.

In the foregoing proposition there are two points involved: First, is the defendant liable under the well-established rule of law in the District of Columbia making it responsible in damages for negligence in caring for its streets; and, second, as attempted to be distinguished by defendant, is this a case wherein the sanitary feature of the street sprinkling operation brings the case within the rule that a municipal corporation is not liable for negligence when performing a public or governmental function.

I.

That the defendant is liable for "its negligence in the care of streets" is well settled.

The first case is that of Weightman *vs.* Washington, 1 Black (U. S.), 39 (17 L. Ed., 52). The action in this case was to recover damages on account of injuries sustained by plaintiff from the falling of a bridge constructed by the authority of the defendant. In this case (beginning at page 57) it is said that a duty was imposed

by its charter upon the City of Washington to care for the bridge and—

> "Where such a duty of general interest is enjoined, and it appears, from a view of the several provisions of the charter, that the burden was imposed in consideration of the privileges granted and accepted, and the means to perform the duty are placed at the disposal of the corporation, or are within their control, they are clearly liable to the public if they unreasonably neglect to comply with the requirements of the charter; and it is equally clear, when all the forgoing conditions concur, that, like individuals, they are also liable for injuries to person or property arising from neglect to perform the duty enjoined, *or from negligence and unskillfulness in its performance.*"

The next case in which the liability of the District of Columbia was brought in question in connection with its management of the streets, is that of Barnes *vs.* District of Columbia, 91 U. S., 540, 23 L. Ed., 440. This action was brought to recover for injuries in consequence of the defective condition of one of the streets of Washington. At the time that this cause of action arose the care of the streets was under "the Board of Public Works," and at page 443 the court said:

> "It is denied that a municipal corporation, as distinguished from a corporation organized for private gain is liable for the injury to an individual arising from negligence in the construction of a work authorized by it. Some cases hold that the adoption of a plan of such work is a judicial act; and, if injury arises from the mere execution of that plan, no liability exists. Child *vs.* Boston, 4 Allen, 41; Thayer *vs.* Boston, 19 Pick., 511. Other cases hold that for its negligent execution of a plan good in itself, *or for mere negligence in the care of its streets or other works, a* municipal corporation can not be charged. Detroit *vs.* Blackeby, 21 Mich., 84, is of the latter class,

where it was held that the city was not liable for an injury arising from its neglect to keep its sidewalks in repair.

"The authorities establishing the contrary doctrine that a city is responsible for its mere negligence, are so numerous and so well considered that the law must be deemed to be stetled in accordance with them."

". . . The authority to open, care for, regulate and improve streets . . . give to municipal corporations all needed authority to keep the streets free from obstructions and to prevent improper uses."

The next case which had under consideration the liability of the District of Columbia for injuries occurring through negligence in the care of the streets of the District was that of District of Columbia *vs.* Woodbury, 136 U. S., 450, 34 L. Ed., 472, and the court said because it was a municipal corporation proper it held in the Barnes case that the District was responsible for such negligence of its officers, "having the care of streets, avenues, and sidewalks as resulted in personal injuries to individuals," and at page 474 this court said:

". . . In our judgment the municipal corporation created by the act of 1878 is subject to precisely the same liability for injuries to individuals, arising from the negligence of the commissioners or of the officers under them in maintaining in safe condition, for the use of the public, the streets, avenues, alleys and sidewalks of the city of Washington, as was the District under the laws in force when the cause of action in the Barnes case arose. It is said that the present corporation, as a corporation, has nothing to do with the streets. That could have been said with equal propriety in reference to the old corporation, when the streets were under the control and supervision of the board of public works. Yet that board was held to be a part of the municipal corporation. Its acts, within the

> scope of its powers, were deemed the acts of the corporation. *Its* negligence, *in the care of streets*, was held to be the negligence of the municipal corporation of which it was a part. So, in this case, the commissioners, having full control of the streets, are under a duty to keep the public ways of the city in such condition that they can be used with reasonable safety. *Their neglect in that matter is the neglect of the municipal corporation of which they are the responsible representatives, although subject to the paramount authority of Congress.*"

These authorities establish beyond the possibility of dispute the liability of the defendant for negligence in caring for and maintaining the streets of the District of Columbia. In other words, that while engaged in such work the District is not performing a governmental function. It is attempted by the defendant in the case at bar, however, to distinguish these cases inasmuch as it is claimed that in the performance of the work of cleaning the streets, as was the fact in the case before us, the defendant was engaged in a work which had for its object the preservation of the health of the District of Columbia by allaying the dust which had accumulated in the streets thereby preventing disease, and in other respects contributing to the genearl welfare, comfort and happiness of the citizens by the process of sprinkling water over the streets. On this point it is conceded that there is a sharp conflict of authority, and it is for this court to decide whether it is prepared to extend the doctrine of the nonliability of the District of Columbia for negligence any further than it has already been carried in a case where it appears to us the weight of authority is largely in favor of the defendant's liability, yet we must concede that there are some very respectable authorities apparently to the contrary.

We now refer the court to the cases which have held municipal corporations liable under circumstances more

or less similar to the case at bar. The first case to which we call your honors' attention is that of Quill *vs.* New York, 36 App. Div., 476, 66 N. Y. Supp., 889. In this case plaintiff was seeking to board a car and was struck by an ash and garbage cart belonging to the street cleaning department of the defendant. Held that the removal of ashes and garbage by a municipality is not a governmental function but a private duty which would otherwise rest upon the property owners. In referring to Love *vs.* Atlanta (one of the cases very much relied upon by defendants in the case at bar), the court said that the city is not liable for the action of its health authorities in the protection of public health, we concede to its fullest extent. But the work undertaken by the city in the cases cited is not at all part of the governmental work or duty of the State in protecting the health of its citizens. . . . The court also disapproved of the decisions of the trial term in Bishop *vs.* New York, 21 Misc., 598, 48 N. Y. Supp., 141, and Davidson *vs.* New York, 24 Misc., 560, 54 N. Y. Supp., 51. Again in the case of Missano *vs.* The Mayor, etc., 160 N. Y., 126, this time the Court of Appeals of New York stated in an action to recover damages for the death of a child who was run over and killed by a horse attached to an ash cart of the street cleaning department of the defendant:

> "Judge Dillon points out in his book on Municipal Corporations that such corporations are possessed of dual powers, the one governmental, etc., . . . the other propriety or private, and that (par. 66) *the care of streets is within the latter classification.*
>
> "This principle has been recognized in many other cases in this State that need not be cited. It has also been approved by the Supreme Court of the United States in Barnes *vs.* District of Columbia, 91 U. S., 540, and by the Circuit Court of the United States in Barney Dumping Boat Co. et al. *vs.* Mayor, etc. (40 Fed., 50). In the lat-

> ter case, Judge Wallace, in referring to the Commissioners of street cleaning, aptly says, 'his duties, unlike those of the officers of the health, charities, fire and police, although performed incidentally in the interest of the public health, are more immediately performed in the interest of the corporation itself which is charged with the obligation of maintaining its streets in fit and suitable condition for the use of those who resort to them. . . .
>
> "It is clear on principle and authority that the city of New York in the ordinary and usual care of its streets, both as to repairs and cleanliness, is acting in the discharge of a special power granted to it by the legislature in the exercise of which it is a legal individual as distinguished from its governmental functions when it acts as a sovereign."

Not only have all the State courts of New York held against the contention of the defendants, but also the federal courts of New York have followed the reasoning of the State courts on the proposition under discussion, as will be seen in Barney Dumping Boat Company *vs.* Mayor, etc., 40 Fed., 50:

> "The testimony in this case shows clearly that the injuries to the dumping boat, for which the libellants seek to recover damages, were caused by the carelessness of those in charge of the steam tug belonging to the respondents. Their negligent acts were committed while they were engaged in removing refuse from the streets. These persons were under the immediate employment of the Commissioners of street cleaning of the city of New York. That officer, as the head of that municipal department, had the custody of the tug. By act of the legislature known as the 'Consolidation Act,' he is charged with the duty of keeping the streets cleaned and removing refuse 'as often as the public health and the use of the streets may require,' and is invested with

> authority to engage and discharge, at his discretion, all the employes necessary for the performance of the duties of the department. The only legal question on the case which merits notice is whether the city is liable for the negligence of the employes of this department. If the duties delegated to him by law are such as primarily devolve upon the city as a municipal or corporate obligation, he and his subordinates are the agents of the city and the respondents are liable for their acts of misfeasance or nonfeasance done in the course of their ordinary employment. It does not seem reasonable to treat the Commissioner as an officer of the general public rather than of the city. His duties, unlike those of the officers of the departments of health, charities, fire and police, although performed incidentally in the interest of the public health, are more immediately performed in the interest of the corporation itself which is charged with the obligation of maintaining its streets in fit and suitable condition for the use of those who resort to them."

We now pass to some of the other State decisions in favor of the contention of plaintiff. In the case of Young *vs.* Metropolitan Street Railway Company & Kansas City, 126 Mo. App., 2, the defendant railway company operated street railways in Kansas City and the defendant conducted a street cleaning department. Plaintiff was injured as the result of a collision of one of the defendant's cars with a mule and cart belonging to the city street cleaning department engaged in removing dirt and rubbish from the street. At page 8, the court said:

> "But in our opinion the better rule is that a city is liable for the negligence of its servants in cleaning its streets. . . . Cleaning the streets consists in removing dirt and rubbish therefrom. In the instance here involved the city's servant was engaged in carting away piles of dirt which

had been gathered by other servants in advance of him. It was the duty of the city to clear the streets not only for proper appearances but so as to keep them free and safe for travel; and there can be no doubt but that if it had left piles of dirt unguarded and some one passing while exercising care was injured in person or property by reason of the obstruction, the city would be liable. . . . The fact that cleaning streets is conducive to public health is a mere incident and does not affect the question. Sewers are always, and properly repaired streets are frequently, conducive to the health of congested populations, yet that does not prevent the application of ordinary rules of liability for negligence as applied to either.

"But defendant bases its argument on the ground that the city was engaged in work exclusively for the public health and as such was in the performance of a governmental function for which liability does not attach. There are many cases in this State and elsewhere deciding (indeed it is generally conceded to be law) that for those things which the city does in its governmental capacity for the general good as distinguished from its public capacity for its private advancement, no liability attaches. . . .

"In this case the city was not acting in a governmental capacity for the general good in protecting the health of the community as perhaps it might have been had the act complained of been the establishment of a pesthouse or the enforcement of ordinances against contagious diseases and the like. Here the servant of the city was engaged in removing dirt from the street which if left upon them might make them unsafe, or at least inconvenient for travel. Mud and dirt in some situations result in injury to travelers and render the city liable in damages. In this case the servant was engaged in removing piles of dirt which as just intimated if left remaining would have rendered the city liable if damage had been caused by them. Thus considered, we believe

> that in holding the city liable we are not opposing numerous cases in counsel's brief cited for the purpose of relieving the city from responsibility for the acts of its officers or servants in protecting the public health. But even in determining the general question the fact that the act may be helpful to the general health or may in some remote degree be referable to governmental regulation ought not to control. Those features of the case should be considered more as incidental than as the sole purpose."

In the case of Denver *vs.* Porter, 61 U. S. C. Ct., 168, it appears that Porter was the owner of a small tract of land within the limits of the city of Denver upon which had been erected a building. Nearby was a tract of land which was designated by the city as a public dumping grounds, and there was deposited the refuse of the city. A fire broke out in the dumping grounds through the negligence of those in charge, which spread to plaintiff's building. At page 173 the court said:

> "It is urged by counsel that the establishment and maintenance of the dumping ground and the gathering and deposit there of such refuse of the city as the evidence shows the dump was used for, appertained to sanitation and the general health of the public, and the control and management thereof having been properly entrusted to the health department of the city, the acts of the officers and employes of that department in respect of such duties were not the acts of municipal representatives. But in almost all affairs of purely local concern some indirect relation may be traced to a matter of health, safety, or other subject of governmental cognizance. The test is not that of casual or incidental connection. If the duty in question is substantially one of a local or corporate nature the city can not escape responsibility for its careful performance because it may

in some general way also relate to a function of the Government. Thus, from very early times, the maintenance of highways has been of general interest. Nevertheless the overwhelming weight of authority is to the effect that the superintendence and care of the streets and alleys of a city, and all that directly pertains thereto, are peculiarly in the class of municipal duties, for the neglect of which the city in its corporate character is liable. In Barney *vs.* Mayor, 40 Fed., 50, the injury complained of was caused by the negligent acts of employes of the Commissioner of Street Cleaning of the city of New York, who were engaged in removing refuse from the streets. As in the case before us it was contended that such work was for the safeguarding of the public health, but the court said that it did not seem reasonable to treat the Commissioner as an officer of the general public rather than of the city. 'His duties, unlike those of the officers of the departments of health, charities, fire and police, although performed incidentally in the interest of the public health, are more immediately performed in the interest of the corporation itself which is charged with the obligation of maintaning its streets in fit and suitable condition for the use of those who resort to them.' . . . The proper disposition of the sewage of a city has even a more direct influence upon the health of the inhabitants, yet it is held that in the maintenance of its sewers a city acts ministerially and negligence in respect thereto may be the basis of an action. (Cases cited.)

"We are of opinion that in the case before us the removal of the waste and refuse from the alleys of the city in the city carts, the deposit thereof upon the dumping grounds near Porter's premises, and the supervision of such work and of the dump itself were of local or municipal concern, and that the officers and employes of the health department of the city in the discharge of their duties in connection with such work and supervision were acting as the representatives of the city for whose

negligence acts or omissions it would be liable.

. . .

". . . We have not overlooked Connelly *vs.* Mayor, 100 Tenn., 262, where the injury was caused by the negligenct driving of a street sprinkling cart, or Condict *vs.* Jersey City, 46 N. J. L., 157, in which it was held that the city was not liable for the negligence of an employe of the board of public works in removing ashes and other refuse from receptacles on a sidewalk to a public dumping ground. To the entent that these cases are not founded upon local statutes or conditions we are unable to follow them."

We have next the case of Pass Christian *vs.* Fernandez, 56 So. (Miss.), 329, 39 L. R. A. (N. S.), 649. Ernest Fernandez, a child 4 years old, while playfully chasing a hoop in the street of the city of Pass Chrisitan, was run over by a city cart and had his leg broken. He recovered a judgment from which the city appealed. Says the court:

"It may be true, as an abstract proposition of law, that damage occasioned by the city in the exercise of a purely governmental duty, does not render the city liable; but it must be a governmental duty, and the idea that a driver of a city cart engaged in hauling trash and dirt for the city is engaged in a 'governmental function' in any sense in which the word is used in the law, requires a stretch of the imagination that is beyond our power to make. It is a matter of no little difficulty to define what are and what are not purely governmental duties of a city. To a very large extent, these questions can only be settled by the facts of each particular case, so variant are the conditions under which this question arises.

"The public or governmental duties of a city are those given by the State to the city as a part of the State's sovereignty, to be exercised by the city for the benefit of the whole public, living

> both in and out of the corporate limits. All else is private or corporate duty, and for any negligence on the part of the agents or employes of the municipality in the discharge of any of the private duties of the city, the city is liable for all damages just as an individual would be. The use of the cart in hauling dirt or trash for the city is for no governmental purpose, as connected in any way with the sovereign duty of the State. The State does owe the duty to all its citizens of protecting the person from assault and the property from destruction, and all done by the city in furtherance of this duty of the State is done in a governmental capacity. But the hauling of dirt and trash is for the use and advantage of the city in its corporate capacity, is a corporate duty, and the city is liable for all damage done by any officer or agent so employed."

Ostrum *vs.* City of San Antonio, 95 Tex., 525, 62 S. W., 909, overruling the same case in 60 S. W., 591, was an action to recover damages by reason of trespass upon the property of plaintiff by agents of the street cleaning department, in that they forcibly and without plaintiff's permission, drove wagons and carts, carrying the garbage of the city, over her property en route to the dumping ground. At page 525, the court said:

> "The rules of law which govern in determining the rights of parties in this case are clearly stated by Chief Justice Gaines in White *vs.* City of San Antonio, as follows: 'A municipal corporation proper—a city for example—acts in a twofold capacity. Certain functions are conferred upon it in the interest of the public at large, and certain others for the peculiar advantage of its own inhabitants. For the unlawful acts of its officers in performing functions of the former class the corporation is held as a rule not to be responsible; but for their torts in discharging duties of a purely corporate character the corporation is liable.' . . . The question for us to determine is to

which of the two classes of powers expressed in the foregoing citation does the act performed in cleaning the streets of San Antonio belong? In the case of the City of Galveston *vs.* Posnainsky, 62 Tex., 127, Judge Slayton for the court said: 'It would seem that in so far as municipal corporations of any class and however incorporated exercise powers conferred on them for purposes essentially public—purposes pertaining to the administration of general laws made to enforce the general policy of the State—they should be deemed agencies of the State and not subject to be sued for any act or omission occurring while in the exercise of such power, unless by statute, the action be given; that, by reference to such matter they should stand as does sovereignty, whose agents they are, subject to be sued only when the State by statute declares they may be. . . . In so far, however, as they exercise powers not of this character, voluntarily assumed, power intended for the private advantage and benefit of the locality and its inhabitants—there seems to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damages to which an individual or private corporation exercising the same powers for a purpose essentially private would be liable.'

"In what sense can it be said that the cleaning of the streets of San Antonio was a duty that primarily rested upon the State of Texas? We know of no principle of law upon which such duty can be based, nor any case which has so held, nor any instance in which such power has been exercised by the State for the benefit of the general public, and we must conclude that it does not fall within that class of cases which are specified as being powers to be exercised for the good of the general public imposed upon a municipal corporation for enforcement within its limits. The law imposed the duty of cleaning the streets upon the city of San Antonio within its own limits primarily and especially for the benefit of its own people. It is strictly a corporate function, for the abuse

> of which by its agents in the course of their regular employment the city must be held liable. (Cases cited.) . . .
>
> "The following cases hold a contrary doctrine: Condict *vs.* Jersey City, 46 N. J. L., 160; Love *vs.* Atlanta, 95 Ga., 132; Connelly *vs.* City of Nashville, 46 S. W. Rep., 565; Kuehn *vs.* City of Milwaukee, 65 N. W. Rep., 1030."

The case of Denver *vs.* Davis, 37 Colo., 187, 86 Pac., 98, 6 L. R. A. (N. S.), 1013, was an action by Mary Davis against the city Denver, to recover damages resulting from the destruction of her property by fire alleged to have been caused by the negligence and carelessness of the officers and agents of the city. Plaintiff was the owner of personal property in a building adjacent to the city dumping ground which had been established by the health commission of the city pursuant to the requirements of a municipal ordinance. The supervision and control of the dumping ground was in the health commissioner, who discharged this duty by officers appointed by him and paid by the city. The combustible material deposited on the dump had been burning several weeks when on May 2, 1901, the fire, driven by heavy wind, communicated to the building in which plaintiff's property was stored, and the same destroyed.

> "As before stated, the supervision and control of the dumping ground was delegated to the health commissioner, who through his officers and employees, had control of the deposit of waste materials brought there, and was also charged with the prevention of combustion and spreading of fire. The greater portion of the material deposited upon the dumping ground was so deposited by the city teams connected with the street cleaning department. We think that the evidence in this case clearly established the fact that the establishment and maintenance of this dumping ground was for the convenience and benefit

of the inhabitants of the city, and as an adjunct to the street cleaning department of the city, and was not in the discharge of any public duty imposed upon the city by the State that it was local and special in its character; that the collection and deposit of such material as the evidence shows was deposited upon the dump was the exercise of a municipal function by the city in its private and corporate capacity. The overwhelming weight of authority is to the effect that the superintendence and care of the streets and alleys of a city, and all that directly pertains thereto, are peculiarly in the class of municipal duties for he neglect of which the city, in its corporate character, is liable."

The following are the cases which are principally relied on by the defendant to combat the contention of the plaintiff in this cause. In the case of Coates *vs.* District of Columbia, 42 D. C. App., 194, upon which defendant seems to particularly lay stress, the court held the duties imposed upon the *health department* of the District of Columbia are public and governmental in their nature; that the disinfection of a dairy supplying milk to the residents of the District of Columbia is a governmental function of the District health department, and the District is not liable for loss of cows resulting from negligence in its performance. It will readily be seen that this case is not analogous to the one at bar.

In the case of Brunhke *vs.* La Crosse, 50 L. R. A., N. S., 1147, it was held that a municipal corporation can not be held liable for injuries to a child who catches hold of the chains of a dump wagon used for street cleaning purposes just as it is about to be dumped on the theory that the municipality is maintaining an attractive nuisance. The court further lays down the general principle that the city is not responsible for negligence in the care and maintenance of highways.

In Connelly *vs.* Nashville, 100 Tenn., 262, the action was to recover damages for injuries sustained as the result of negligence of a driver of a sprinkling cart in colliding with the wheel of plaintiff's buggy. In this case the work was being performed exclusively under the direction of the health department, and it is more than probable that such fact influenced the decision of the court, for in this connection the court said: "The right or power of the corporation of Nashville to sprinkle its streets does not rest as was argued at the bar upon subsection 9 of section 17 of its charter, which authorizes the city, 'to make appropriations to open, alter, abolish, widen, extend, clean and keep in repair streets, etc.,' but rather upon subsection 7 of section 17, which provides that the corporate authorities may 'make regulations to secure the general health of the inhabitants, and to prevent and remove nuisances.' . . . While engaged in doing work under such an ordinance the municipality is discharging a governmental duty and is not responsible for the carelessness of the agent or agency so employed."

The same is the fact in the case of Love *vs.* Atlanta, 95 Ga., 129, 133, in which case action was brought against the city of Atlanta due to the running away of a mule attached to a wagon driven by a small colored boy, employed under the direction of the health board of the city in cleaning the streets and removing therefrom such putrid and offensive substances as usually accumulate in the streets of densely populated cities, and which are necessary to be removed, because remaining they endanger the public health. And it was entirely upon the theory that the employe in question was engaged in a work relating exclusively to the public health, that the case was decided, for the court says:

> "If the health department was engaged in clearing away or removing obstructions from the streets which in no way endangered the public

> health, the responsibility of the city would then rest upon the rule of liability for work connected with the repairing and keeping in order the public highways."

Condict *vs.* Jersey City, 46 N. J. L., 157, was an action brought to recover damages for the death of plaintiff's intestate, caused by negligence in the management of a horse and cart owned by the city and under the direction of the board of public works. This case is in direct conflict with the cases cited on behalf of plaintiff. The same may be said of the case of Savage *vs.* City of Salem, 23 Oreg., 381; Kuehn *vs.* City of Milwaukee, 92 Wisc., 263, in which case the court held that the plaintiff was an independent contractor, and upon that ground held the city not liable for damages to his fishing nets by reason of garbage which had been dumped into Lake Michigan becoming entangled in the nets. The court also said that in this case the city was engaged in the performance of a public service in which it had no particular interest and from which it derived no special benefit, but which it was bound to see performed in pursuance of the duty imposed by law, for the general welfare of the inhabitants of the community.

The case of Bryant *vs.* St. Paul, 33 Minn., 291, is another case in which damages are claimed for the misfeasance or negligence of the board of health or its agents in leaving a vault upon private premises exposed.

The case of Haley *vs.* Boston, 77 N. E., 888, 5 L. R. A., N. S., 1005, is another one of the cases which are in direct conflict with the authorities cited by plaintiff, and in which damage was claimed by plaintiff for injuries sustained through the negligence of the driver of a cart employed by the *sanitary division* of the street department of the city of Boston.

Counsel for defendant seems to rely on Hill *vs.* Boston, 122 Mass., 376, but inasmuch as the injury in that

case occurred in connection with the operation of a public school it differs from the case at bar.

The case of Workman *vs.* The Mayor, etc., of New York, 179 U. S., 574, 45 L. Ed., 325, seems to be considered by counsel as helpful to defendant's contention. We invite attention to the following:

> "We must not be understood as conceding the correctness of the doctrine by which a municipal corporation, as to the discharge of its administrative duties, is treated as having two distinct capacities, the one private or corporate and the other governmental or sovereign, in which latter it may inflict a direct and positive wrong upon the person or property of a citizen without power in the courts to afford redress for such wrong. That question from the aspect of both the common and municipal law, was considered by this court in Weightman *vs.* Washington (1861) 1 Black., 39, 17 L. Ed., 52; Barnes *vs.* District of Columbia (1875), 91 U. S., 540, 23 L. Ed., 440; and in District of Columbia *vs.*Woodbury (1890), 136 U. S., 450, 34 L. Ed., 472. And although this opinion is confined to the controlling effect of the admiralty law, we do not intend to intimate the belief that the common law, which benignly above all considers the rights of the individual, yet gives its sanction to a principle which denies the duty of courts to protect the rights of the individual in a case where they have jurisdiction to do so. For these reasons we are sedulous to say that we must not be understood as in anywise doubting the correctness of the doctrines expounded by this court in the cases just cited, or as even impliedly approving contentions which may conflict with the principles announced in those cases."

We respectfully submit that the judgment of the Supreme Court of the District of Columbia should be reversed.

ROSSA F. DOWNING,
Attorney for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 189.

ADELBERT HARRIS, BY HIS NEXT FRIEND, ALBERT HARRIS,

vs.

DISTRICT OF COLUMBIA.

ON A CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 9, 1917.

BRIEF OF APPELLEE.

This is a tort action brought to recover damages from the District of Columbia by reason of the fact that Adelbert Harris, an infant, had the first joint of his right forefinger cut off through the alleged negligence of a driver of a street sprinkling cart in closing down the lid of a fire plug, from which he had just filled the tank of the sprinkler, which was then being used to sprinkle the streets of the city.

It is respectfully submitted that, as a matter of law, but

two questions are involved in the case in its present status. These questions are, one, Was the sprinkling cart being used for the benefit of the health of the community at large and therefore not for the benefit of the appellee, a municipal corporation, in its special or private capacity, as distinguished from its governmental or legislative capacity? Second, Is the protection of the public health a function exercised by a municipality in its governmental or legislative capacity, or is it a function exercised in the interest of the municipality for its special or private advantage?

Answering these questions in the reverse order, it is submitted that the authorities are so nearly unanimous in holding that the protection of the public health by a municipality is a function which it exercises in its governmental and legislative capacity, and for which it is not answerable to an individual by reason of its omissions or negligence in that regard, that further discussion of this second question need not be had.

The case of Coates *vs.* The District of Columbia, decided in the April term, 1914, by the Court of Appeals of the District of Columbia (42 App. D. C., 194), and the authorities there cited conclusively determine this proposition in so far as the courts of the District of Columbia are concerned.

The first question, therefore, becomes the only one necessary to discuss at any length, and an effort has been made in the following pages to give some idea of just how this question has been treated by the courts of various jurisdictions.

Reference first is had to Dillon, Municipal Corporations. At section 1662 of volume 4 of the fifth edition of this work it is stated that a diversity of opinion appears in the decisions as to the liability of a municipality for the negligence or torts of its officers and agents engaged in the cleaning of the streets and the removal of garbage and ashes from private premises. In some jurisdictions all of these duties are regarded as governmental functions, and any implied

liability to the municipality is denied. But the contrary view has been held by courts of other jurisdictions.

Among the cases noted by Dillon is the case of Haley *vs.* The City of Boston, reported in 191 Mass., at page 291 (L. R. A., N. S., 5, 1005). The facts of this case were these: The driver of a city ash cart drove the cart over the plaintiff's leg and broke it, and there was evidence of the plaintiff's due care and of the driver's negligence. The question of the implied liability of the municipality for this act was raised in the trial court where a verdict for the defendant city was directed. The case was then taken to the Supreme Court of Massachusetts, which court held that in the Commonwealth of Massachusetts no liability existed against the municipality to render it liable for damages for the neglect or tortious acts of its officers while engaged in the discharge of duties of a public character required or authorized to be done or undertaken without compensation and in the performance of a public duty; and that this general principle of exemption from liability protected the city while performing functions in behalf of the public health. It will be noted by an examination of this opinion that in the Commonwealth of Massachusetts liability exists against municipalities where the municipality has chosen to take the work of repairing or constructing a street or bridge out of the charge of the officers designated by law or where it has exercised negligence in the construction of water works or the laying of water pipes, or in the construction or maintenance of sewers, or has ineffectively handled the problem of lighting the streets and furnishing facilities therefor. The removal of the ashes was carried out under the provisions of a city ordinance, which, by its terms, was applicable only to house ashes, which, the court said, "were taken away as a matter of duty, solely for the public good, under the ordinance above quoted." The exceptions were overruled and the trial court sustained.

In the State of Wisconsin there are numerous decisions holding that the removal of ashes and garbage and the sprinkling of streets are functions performed by a municipality in its governmental character and any implied liability is denied. The case of Bruhnke *vs.* La Crosse, decided in January, 1914, and reported in 50 L. R. A., N. S., at page 1147, is believed to be the latest Wisconsin decision of this nature. The facts in this case were that a small child followed along the streets immediately in the rear of a wagon used by the city to remove earth and refuse, which wagon had a mechanically operated dumping device controlled by chains, which were unguarded and attached to the rear of the wagon. The evidence indicated that the driver of the wagon negligently operated a device, caused the ashes to move, and the child, who was about five years old, was thus drawn into contact with the wagon or its parts and seriously injured. The court said that the city was not responsible for the negligence of the driver of this wagon for the reason that in the maintenance and care of its highways the city was engaged in the discharge of governmental functions, and while in the District of Columbia the maintenance of highways free from defects and obstructions is a duty found by the Supreme Court of the United States to be imposed upon the city, yet the principle involved in this Wisconsin case is identical with the case at bar, as the exemption of the city of La Crosse from liability to answer for even a defect in its highways or in the maintenance of its streets arises by reason of the absence of a statute in such case. It would, therefore, follow, it being admitted generally that no liability arises except by statute, that the plaintiff in this case cannot recover, as there is no Statute in the District of Columbia making it liable for the negligence or torts of its officers or agents while engaged in the performance of a duty having relation to the protection of public health.

In passing, it might be well at this point to refer to one of the authorities cited by counsel for appellant, the case of the city of Pass Christian *vs.* Fernandez, 39 L. R. A., N. S., 649. In this case the city was held liable, but, as indicated in the foot note, which is supplemental to the foot note of Haley *vs.* Boston, reported in 5 L. R. A., N. S., at page 1005, the question is still a matter of diversity of opinion, as shown by the cases of Louisville *vs.* Carter, 142 Ky., 443, and Johnson *vs.* Sommerville, 195 Mass., 370, therein cited, and we are, after all, thrown back on the broad general principle, and are to be governed by it rather than by individual cases.

It is submitted that as a matter of principle there is no difference between the protection afforded a city by the health officers thereof, who may operate under the chief health officer and be designated as deputies and whose duties are to isolate persons suffering with contagious diseases or infectious diseases, or to perform the thousand and one other duties well recognized as falling within their purview, and the duties and functions performed by the agents of another department of the city government, whatever may be the name of that department, when those duties, as in the instant case, have relation to the removal from the streets of any substance, however deposited thereon, which, from its nature, or which through lapse of time, had it not been removed, would, as a matter of common sense, become the vehicle by which disease is spread or in which contagion might be propagated. If the sewers of the city become clogged with refuse and fail to carry off the surplus water, would any one argue that a municipality, acting by its health officers, as such, is not engaged in the protection of the public health in flushing the sewers to remove the obstruction? Following this argument, assume for the sake of argument that the Street Cleaning Department of the city is discontinued for a short space of time. Is there any-

thing unreasonable in the conclusion that a heavy rainfall might carry the refuse matter accumulated in the streets, in the interim, into the sewers and obstruct them, bringing about the same condition just assumed, and does it not follow, as a matter of reason, that the only way to guard against such a contingency is to regularly and thoroughly sprinkle the streets to allay the dust and prevent thereby the spread of germs, and to sweep up and remove all of the refuse in the streets. Aside from the case of Coates *vs.* D. C., *supra,* the Court of Appeals of the District of Columbia, in the case of the District of Columbia against Tyrrell, 41 Appeals D. C., 463, applies the theory of governmental function in a case wherein it was sought to hold the District of Columbia liable in damages for injuries sustained by the explosion of gas in a public school building. In the opinion in that case the court holds that the District in the maintenance of the school is in the discharge of a governmental function and not liable, likening the case to that of Hill *vs.* Boston, *post,* and differentiating the case from Barnes, Weightman, Woodbury, *vs.* D. C.

In the case of Connelly *vs.* Nashville Railway, 100 Tenn. 262, the plaintiff sought to recover damages for personal injuries sustained by Mrs. Connelly, the result, it was alleged, of the negligence of one of the defendant's servants, a driver of a sprinkling cart, while engaged in the service of the city; the negligence complained of being that the driver allowed the sprinkling cart to collide with the wheels of plaintiff's buggy, in which she was sitting, so that the horse attached to her buggy took fright and overturned the buggy, inflicting the injury complained of. Defendant demurred on the theory that the duty which the city was discharging at the time of the accident was a public one and that the defendant was not liable in damages for the negligence of its agent which brought about the injury.

The trial court sustained defendant's demurrer, and the

Supreme Court affirmed that decision, likening the case to those in which it has repeatedly been held a municipal corporation is not liable for the tortious acts of its police officers or for its health officers. Citing Long's Administrator *vs.* Richmond, 17 Gratt., 375, and, also, cases wherein municipalities have been held not liable for defects in public squares. Citing Nixon *vs.* Newport, 13 R. I., 454, or for the negligence of an ambulance driver (Maxmillian *vs.* N. Y., 62 N. Y., 160); or for the negligence of firemen (Burrill *vs.* Augusta, 78 Me., 118), and Edgerly *vs.* Concord, 62 N. H., 8. In the opinion the learned justice said:

> "These cases all rest on the principle that the municipality, in each one, at the time of the injury complained of, was tngaged in the discharge of a governmental duty as distinguished from one that is purely corporate or ministerial.
>
> "The case at bar we think clearly within this class. The right or power of the corporation of Nashville to sprinkle its streets does not rest, as was argued at the bar, upon that provision of its charter which authorizes the city to 'make preparations to open, alter, abolish, widen, extend, clean, and keep in repair streets,' but rather upon that provision of its charter which provides that the corporation may 'make regulations to secure the general health of the inhabitants and to prevent and remove nuisances.'
>
> "The ordinance of the city, directing the sprinkling of this street in pursuance of this charter provision is one that is sanitary in its character, passed in view of the health and comfort of the general public. While engaged in doing work under such an ordinance, the municipality is discharging a governmental duty, and is not responsible for the carelessness of the agent or agencies so employed."

The case of Love *vs.* The City of Atlanta, reported in 95 Georgia Supreme Court Reports, at page 129, is a case wherein the plaintiff sought to recover damages from the city of Atlanta for injuries sustained by him as the result of

the running away of an animal attached to a garbage cart of the city, the plaintiff alleging that the runaway was due to the negligence of the driver of the cart, who was a servant of the defendant city. It was also alleged that the driver was a small negro boy, wholly incompetent for the discharge of the duty, and the evidence adduced proved the plaintiff's cause of action as laid. At the conclusion of the trial the judge directed a verdict for the defendant. This judgment was affirmed by the Supreme Court, which said, per Mr. Justice Atkinson:

> "Distinctions do not appear to have been at all times accurately drawn between the classes of cases in which a municipal corporation would be liable and those in which it would not be liable for a misfeasance or non-feasance of a public servant employed under municipal authority in the discharge of duties relating to corporate affairs. One general proposition, however, seems to have received general recognition at the hands of courts of last resort, wherever that class of cases has been considered, and that class of cases is, that where an injury sustained is inflicted because of the misfeasance of an agent of a corporation while engaged in a duty pertinent to the exercise of what are termed governmental functions of a corporation, the city is not liable. * * * Some difficulty has arisen in the proper classification of cases in order to assign each to its proper position with reference to the liability or non-liability of a corporation, and the courts have not been entirely consistent at all times in this regard. As an illustration of this it is held that cities are liable for damages resulting from the non-report or for the dangerous condition of public streets, and this in the absence of strict statutory liability imposed by law. It has been held that they are not liable for damages occasioned by their fire departments for injuries to persons or property in going to or from fires. The former case is one that might properly have been originally classified among the cases of non-liability. * * * With respect to matters concerning the

public health, however, there is no serious conflict of reason, opinion or authority upon the correctness of the proposition that the preservation of the public heal.h is one of the duties that devolves upon the State as a sovereign power. It is such a duty as upon proper occasion justifies the exercise of eminent domain and the demolition of structures which injure or impair the public health. * * * If the State delegate to a municipal corporation either by general law or by particular statute this power and imposes upon it within its limits the duty of taking such steps and such measures as may be necessary to the preservation of the public health, the municipai corporation likewise in the discharge of such duty is in the exercise of a purely governmental function affecting the welfare not only of the citizens resident within its corporation, but of the citizens of the Commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the State, and in the exercise of such powers is entitled to the same immunity against suit as the State itself enpoys. * * * It will be observed, however, that in order to exempt the city from liability, it is not sufficient to show that a particular work, from the negligent performance of which, by the servants of the city, a citizen was injured was being performed *under the directions of the health authorities;* but it must be shown that the particular work so being done *was connected with or had reference to the preservation of the public health.* * * * It can make no difference in principle as to the character of the agents employed in the discharge of this duty with respect to the public health. The principle of non-liability rests upon the broad ground that in the discharge of its purely governmental functions, a corporate body to which has been delegated a portion of the sovereign power, is not liable for torts committed in the discharge of such duties and in the execution of such powers. It can be no more liable because of the failure to select competent drivers of garbage carts than a city can be held liable for failure to elect a wise, conservative and discreet mayor.

> "Let us inquire then, whether the particular service being performed by this particular servant of the corporation had special reference to the preservation of the public health. The accumulation of garbage, of substance offensive to the sense of smell; a substance which, if permitted to remain would poison the atmosphere and breed diseases infectious and contagious among the inhabitants of the city, may well be said to injure the public health."

The case of Condict, administrator, *vs.* Jersey City, reported in 46 New Jersey Law Reports of the Supreme Court of that State, at page 157, again illustrates the application of the doctrine. This was an action brought to recover damages for the death of plaintiff's intestate brought about by the negligence of the driver of a city ash cart, who, under the directions of the Board of Public Works of Jersey City, was engaged in removing the ashes from boxes and parcels placed on the sidewalk by citizens. The injury was caused by the negligent dumping of the cart. The opinion of the court, by Judge De Pue, states:

> "By the charter of Jersey City the Board of Public Works is made a department of the city government. Upon this board devolves the duty of cleaning and clearing the streets and public places. * * * It is a settled law of this State that an action will not lie in behalf of an individual, who has sustained a special damage from the neglect of a municipal corporation to perform a public duty unless the right to sue for such an injury is given by statute." (Citing several New Jersey cases.)

The opinion then refers to the well-known doctrine of the exemption of a municipality from liability to answer in damages for the wrongful acts of its police officers in the enforcement of ordinances, or for the negligence of its officers or agents in executing sanitary regulations for preventing the spread of contagious diseases or for injuries occasioned by the

negligence or misconduct of firemen while engaged in extinguishing a fire or for the damages resulting from the acts of employees of the Commissioners of Public Charities in driving ambulances (Maxmillian *vs.* N. Y., 62 N. Y., 160), and proceeds as follows:

> "The true principle on which the municipal corporation is exempted from liability in such cases is that given by Chief Justice Dixon in Hayes *vs.* City of Oshkosh, 33 Wis., 314, that the corporation is engaged in the performance of a public service in which it has no particular interest and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants of the community, and that persons employed in the performance of such duties though employed by the corporation, act as public officers charged with a public service. * * * To impose upon the corporation liability for the negligence of such employees would indirectly fix upon the corporation a liability from which it is by law and considerations of public policies exempted."

The directed verdict for the defendant by the trial court in this case was affirmed by the unanimous vote of the chief justices sitting.

In the case of Savage *vs.* The City of Salem, 23 Oregon Supreme Court Reports, 381, the court said (p. 384):

> "It follows then, that the water tanks in question having been erected by plaintiff, by the authority and permission of the defendant at the place designated and selected by its agent and under his supervision cannot be held to be a public nuisance *per se* if they were erected and maintained for public and not private purposes, and this depends upon whether *sprinkling the streets of a municipality* is a public purpose, or, in other words, a *business in which the corporation itself, may lawfully engage.* There seems scarcely room for two opinions upon this point, so unquestionable is it, that street sprinkling is a public

purpose. As was said by Judge Pierpont in West *vs.* Bancroft, 32 Vermont, 371, in sustaining the right of a city to construct a reservoir in the street for the purpose of retaining water to be used in sprinkling the streets and extinguishing fires:

"'All those acts which tend to facilitate travel, and add to the ease, comfort, and convenience of the traveler or his beast, whether it be by cutting down the hills, filling ravines, paving roads, erecting water troughs, or sprinkling streets, are acts which it is proper and often necessary for the public to do. * * * And perhaps no other one of these acts would do so much to add to the comfort of the passers on the highway as well as all of the inhabitants of the village, as that of sprinkling the streets.' And in State *vs.* Reis, 38 Minn., 371, it was held that street sprinkling is a 'local improvement,' for which an assessment may be levied. * * * In the course of the opinion Judge Mitchell said: 'That street sprinkling is a public purpose is unquestioned.'"

The case of Kuehn *vs.* The City of Milwaukee, decided January term, 1896, and reported in the 92d Wisconsin, page 263, was an action brought against the city of Milwaukee to recover damages to fishing nets of the plaintiff by reason of garbage which had been dumped into Lake Michigan becoming entangled in the nets. The city demurred, and the Supreme Court, in holding that the demurrer was well taken, said:

"If the Commissioners of Public Works had done this work by their own employees and servants without the intervention of an independent contractor the city would not have been liable for such an injury growing out of the acts of such employees or servants, for it is a public service as distinguished from a corporate duty, and in that respect it is like the fire, health, or police departments of cities. In such cases, 'a corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit

> or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law, for the general welfare of the inhabitants of the community,'" citing several Wisconsin cases, and also Condict *vs.* Jersey City, *supra;* Bryant *vs.* St. Paul, 33 Minn., 289, and Dillon on Municipal Corporations.

The case of Massano *vs.* The Mayor, etc., of New York, reported in 160 New York Reports, at page 123, and cited by appellant as an authority on the general doctrine that a municipality is liable to answer for the negligence of any of its officers connected with the maintenance or cleaning of streets, does fix the liability of the city of New York, as appellant claims, but solely upon the theory that the ash cart of the street-cleaning department of New York was an adjunct of the maintenance of the streets rather than an adjunct of the Department of Health, and this by virtue of the *statute* under which the duty accrued to the city of New York to keep its streets in repair and to see that they were thoroughly cleaned and kept clean at all times; also to remove the sweepings, ashes, and garbage as often as the public health *and use of the streets* required it to be done. The court said in this connection that it was clear that the city of New York, in the care of its streets, both as to repairs and cleanliness, is acting in the discharge of a special power granted to it by the legislature (opinion, last paragraph, p. 129).

The dissenting opinion of Judge Gray in this case supports the contention of the District of Columbia in the case at bar, and follows the broader doctrine that the city is not liable to answer for damages occasioned by a branch of the street-cleaning department while about the exercise of its proper function. Judge Gray, in his dissenting opinion, says:

> "In creating this department of the New York city government, the legislature delegated to it, as a

> political agency, a duty which related to the protection of the public health. This duty is one of the highest that pertained to government, for its full and proficient performance manifestly required such legislation as would tend to insure the removal and prevention of conditions favorable to the development, or the spread of diseases."

It will be observed that this dissenting opinion recognizes the implied liability of the municipality to keep its streets bridges, and other ways of passage in repair, and that such acts are corporate acts as distinguished from governmental

The case of Ostram *vs.* San Antonio, 62 Southwestern, at page 909, which case appellant relies upon and which reversed the trial court and held the city of San Antonio to be liable in damages for a trespass upon private property by hauling garbage from the city of San Antonio thereover, even after the city had been enjoined for so doing, is a case which in effect holds that in the disposition of its garbage the city is exercising, not a governmental function, but a duty specifically imposed upon it by law. This opinion recognizes the general doctrine that the protection of health is governmental, but reaches the conclusion that the removal of garbage is not connected therewith. The same difference of opinion as to which class of powers an act of this sort falls within appears in this case, and the decision, after all, is but the expression of the Supreme Court of Texas, following the opinion in the case of Fort Worth *vs.* Crawford, 64 Texas, 202, that this is a private or corporate act and not a governmental one. It is difficult to understand, in the light of the reasoning of other cases cited herein, just how the court concludes that the city of San Antonio, bound as it is by law to remove this garbage, primarily and especially for the benefit of its own people, is not thereby doing something in which the people of the State may not be interested or profited.

The case of Hill *vs.* The City of Boston, 122 Mass., 344,

is a case in which this whole theory is given, as Judge Dillon says in his work on Municipal Corporations, "a most masterly and learned discussion," this doctrine being therein treated in every phase, and it is submitted that the conclusions therein arrived at have not at any time by any court been logically negatived. The opinion is a lengthy one and deals with the subject from the time of its treatment in early English cases down to and through the opinion of the Supreme Court of the United States in Barnes *vs.* District of Columbia; Weightman *vs.* D. C.; Woodbury *vs.* D. C. Judge Gray, who rendered that opinion, concludes, after an examination of the English authorities on the subject:

> "That when a duty is imposed upon a municipal corporation for the benefit of the public, without any consideration or emolument received by the corporation, it is only where the duty is a new one, and is such as is ordinarily performed by trading corporations that an intention to give a private action for a neglect in its performance is to be presumed."

Further in the opinion he says:

> "The earlier cases in the Supreme Court of the United States contain nothing inconsistent with our own decisions upon this subject. In Fowle *vs.* Alexandria, 3 Peters, 398, 409, Chief Justice Marshall pointed out that the general rule of money corporations or those carrying on business for themselves are liable for interests was not equally applicable of a legislative corporation established as a part of the government of the country."

And further, at page 379:

> "The cases in the Supreme Court of the United States in which private actions have been sustained against a city for neglect of a duty imposed upon it by law, are of two classes, first, those which arose under the peculiar terms of special charters, in the District of Columbia, as in Weightman against

> Washington, and Barnes *vs.* District of Columbia, (and it will be remembered in these two cases we have damages caused by defects in highways or bridges), and second, those which * * * arose in New York or Illinois, and in which the general liability of the city was not denied or even discussed, and apparently could not have been, consistently with the rule by which the Supreme Court of the United States, upon questions of the construction and effect of the constitution and statutes of a State, follows the latest decisions of the highest court of a State, even if like words had been differently construed in other States."

The case of Workman *vs.* N. Y., etc., reported in 179 U. S., at page 552, has frequently been cited by counsel as an authoritative decision by the Supreme Court on the question of the extension of any such doctrine as is here urged, but if that case be examined it will be discovered that the decision was based solely upon the applicability of the maritime law and that, in effect, the decision only goes to the extent of holding that in admiralty cases courts of admiralty of the United States are not bound by local or State laws. However, assuming for the sake of argument that this decision is not based upon admiralty law, it is evident that Mr. Justice White, who delivered the opinion, was under the impression that the right to maintain the action against the city was given by statute. On page 564, he says:

> "In addition to making the city liable for all expenses connected with the maintenance and operation of the department, it was provided in section 454 (N. Y. Laws of 1882) of the statute that any damage caused by the authorized destruction of buildings to stay the progress of fire should be borne by the city of New York."

Mr. Justice Gray, with whom were Mr. Justice Brewer, Mr. Justice Shiras, and Mr. Justice Peckham, dissented from the opinion and in a masterly review of the authorities of Eng-

land, the several States and the United States concluded that no liability existed against the municipality even under the admiralty law. At page 575 of the dissenting opinion we find this language:

> "We had supposed it to be well settled, on authority and on principle, that no private suit could be maintained against a municipal corporation for an injury to person or property caused by negligence of members of its fire department while engaged in the performance of their official duties."

It will be noted that the decision in this case was that of a bare majority of the court.

It is therefore respectfully submitted that the trial court committed no error in granting appellee's motion for an instructed verdict.

Respectfully submitted,

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(39212.)

HARRIS, BY HIS NEXT FRIEND, ETC. *v.* DISTRICT OF COLUMBIA.

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 16. Argued January 24, 1919.—Decided June 6, 1921.

1. The work of cleaning the streets for the protection of the public health and comfort appertains to the discretionary governmental functions of the District of Columbia, distinguished from the special corporate or municipal duty of keeping the streets in repair. P. 652.
2. The District is not liable for personal injuries occasioned by the negligence of its employee while engaged in sprinkling streets preparatory to cleaning them. P. 652.

THE case is stated in the opinion.

Mr. Rossa F. Downing, for Harris, discussed the following cases:

Weightman v. *Corporation of Washington*, 1 Black, 39; *Barnes* v. *District of Columbia*, 91 U. S. 540; *District of Columbia* v. *Woodbury*, 136 U. S. 450; *Quill* v. *New York*, 36 App. Div. 476; *Missano* v. *The Mayor*, 160 N. Y. 126; *Barney Dumping-Boat Co.* v. *The Mayor*, 40 Fed. Rep. 50; *Young* v. *Metropolitan Street Ry. Co.*, 126 Mo. App. 2; *Denver* v. *Porter*, 126 Fed. Rep. 288; *Pass Christian* v. *Fernandez*, 100 Mississippi, 76; *Ostrom* v. *San Antonio*, 94 Texas, 525; *Denver* v. *Davis*, 37 Colorado, 370; *Coates* v. *District of Columbia*, 42 App. D. C. 194; *Bruhnke* v. *La-Crosse*, 155 Wisconsin, 485; *Conelly* v. *Nashville*, 100 Tennessee, 262; *Love* v. *Atlanta*, 95 Georgia, 129; *Condict* v. *Jersey City*, 46 N. J. L. 157; *Savage* v. *Salem*, 23 Oregon, 381; *Kuehn* v. *Milwaukee*, 92 Wisconsin, 263; *Bryant* v. *St. Paul*, 33 Minnesota, 291; *Haley* v. *Boston*, 191 Massachusetts, 291; *Hill* v. *Boston*, 122 Massachusetts, 376; *Workman* v. *New York City*, 179 U. S. 552.

Mr. Robert L. Williams and *Mr. Francis H. Stephens*, with whom *Mr. Conrad H. Syme* was on the brief, for the District of Columbia.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The Court of Appeals, District of Columbia, has certified the following question (Jud. Code, § 251):

"Is the sprinkling of the streets to keep down dust for the purpose of the comfort and health of the general public, a public or governmental act as contradistinguished from a private or municipal act, which exempts the District of Columbia from liability for the injuries caused by one of its employees engaged therein? "

In order to prepare the streets of Washington for sweeping, it was the practice to sprinkle them from portable tanks. While filling one of these tanks through a hose connected to a water plug, a corporate employee negligently dropped the plug cover and injured Adelbert Harris, a young child. He brought suit against the District of Columbia for damages.

It is established doctrine that when acting in good faith municipal corporations are not liable for the manner in which they exercise discretionary powers of a public or legislative character. A different rule generally prevails as to their private or corporate powers. Dillon on Municipal Corporations, 5th ed., § 1626, *et seq.*, and cases cited.

Application of these general principles to the facts of particular cases has occasioned much difficulty. The circumstances being stated, it is not always easy to determine what power a municipal corporation is exercising. But, nothing else appearing, we are of opinion that, when sweeping the streets, a municipality is exercising its discretionary powers to protect public health and comfort and is not performing a special corporate or municipal duty to keep them in repair. This conclusion, we think, accords with common observation, harmonizes with what has been declared heretofore concerning liability of the District of Columbia for torts, and is supported by well considered cases. *Weightman* v. *Corporation of Washington* (1861), 1 Black, 39; *Barnes* v. *District of Columbia* (1875), 91 U. S. 540, 551; *District of Columbia* v. *Woodbury* (1890), 136 U. S. 450; *Love* v. *Atlanta*, 95 Georgia, 129; *Conelly* v. *Nashville*, 100 Tennessee, 262; *Haley* v. *Boston*, 191 Massachusetts, 291; *Bruhnke* v. *La Crosse*, 155 Wisconsin, 485.

In *Weightman* v. *Corporation of Washington*, *supra*, the corporation was held liable for injuries resulting from an insecure bridge placed by the charter under its exclusive control and management. Among other things, through

Mr. Justice Clifford, this was said: "Municipal corporations undoubtedly are invested with certain powers, which, from their nature, are discretionary, such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen, and for many other useful and important objects within the scope of their charters. Such powers are generally regarded as discretionary, because, in their nature, they are legislative; and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation, at the suit of an individual, for the failure on their part to perform such a duty. . . . Whether the action in this case is maintainable against the defendants or not, depends upon the terms and conditions of their charter, as is obvious from the views already advanced."

Barnes v. *District of Columbia*, *supra*, presented a case of injury arising from a defective street. The District was held liable, and, for the court, Mr. Justice Hunt said, concerning the point presently important:

"Some cases hold that the adoption of a plan of such a work is a judicial act; and, if injury arises from the mere execution of that plan, no liability exists. *Child* v. *City of Boston*, 4 Allen, 41; *Thayer* v. *Boston*, 19 Pick. 511. Other cases hold that for its negligent execution of a plan good in itself, or for mere negligence in the care of its streets or other works, a municipal corporation cannot be charged. *City of Detroit* v. *Blackeby*, 21 Michigan, 84, is of the latter class, where it was held that the city was not liable for an injury arising from its neglect to keep its sidewalks in repair.

"The authorities establishing the contrary doctrine that a city is responsible for its mere negligence, are so

numerous and so well considered, that the law must be deemed to be settled in accordance with them." (Citing many cases.)

District of Columbia v. *Woodbury, supra.* Woodbury claimed damages for injuries resulting from a sidewalk, negligently permitted to remain out of repair. Held, that the principle of *Barnes* v. *District of Columbia* applies, notwithstanding the form of the District government had been changed.

In *Roth* v. *District of Columbia*, 16 App. D. C. 323; *Brown* v. *District of Columbia*, 29 App. D. C. 273; *District of Columbia* v. *Tyrrell*, 41 App. D. C. 463; and *Coates* v. *District of Columbia*, 42 App. D. C. 194, freedom of the District of Columbia from liability on account of matters within its governmental powers is recognized.

Workman v. *New York City*, 179 U. S. 552, is not applicable. The proceeding being in admiralty, rights and liabilities of the parties depended upon the maritime code and not upon local laws of New York. Here, common-law principles apply. See *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205.

The certified question must be answered in the affirmative.

MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE dissent.